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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of TELEPHONE COMPANY- CABLE TELEVISION Cross -Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	CC Docket No. 87-266 RM -8221

To the Commission:

JOINT COMMENTS REGARDING VIDEO DIALTONE

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December 16, 1994

20550.1

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Pursuant to the Commission's Third Further Notice of Proposed Rulemaking in the above captioned matter, the Attorneys for the Atlantic Cable coalition, The Cable Television Association of Georgia, The Great Lakes Cable Coalition, The Minnesota Cable Television Association, The Oregon Cable Television Association, The Tennessee Cable Television Association, and The Texas Cable TV Association ("Joint Commenters")[1] hereby

[1] The Atlantic Cable Coalition comprises the Cable Television Association of Maryland, Delaware, and the District of Columbia, the New Jersey Cable Television Association, the Pennsylvania Cable Television Association, the Virginia Cable Television Association, and the West Virginia Cable Television Association. The Great Lakes Cable Coalition is comprised of the Cable Television and Communications Association of Illinois, the Indiana Cable Television Association, the Michigan Cable Television Association, the Ohio Cable Television Association, and the Wisconsin Cable Television Association. The associations represented by these coalitions, as well as those individually listed include more than 4700 cable systems serving 28 million subscribers. These coalitions and associations have

submit these Comments in response to the Commission's Third Further Notice concerning Video Dialtone.

INTRODUCTION AND SUMMARY

The keystone of the Commission's video dialtone structure is that video dialtone systems must offer sufficient capacity to serve a multiplicity of programmers on a nondiscriminatory, common carrier basis.[2] With this requirement, the Commission has recognized that absent sufficient capacity initially, or the ability to expand, LECs could use their video dialtone systems as anticompetitive bottlenecks, thwarting the achievement of the Commission's goals of increased competition and diversity in the video services markets.[3] Despite the Commission's repeated public commitment to these principles, LECs and other parties have continued to present the Commission with proposals that are entirely inconsistent with the rules and regulations governing the deployment of video dialtones systems and service. Notwithstanding, the Commission has sought comment on certain of these proposals.

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participated in the various video dialtone 214 proceedings at the Commission.

[2] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5797, ¶ 29 (1992) ("Video Dialtone Order"), recon., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269, ¶¶ 30-39 (released Nov. 7, 1994) ("Video Dialtone Order Recon"or "Third FNPRM"), appeal pending sub. nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

[3] Video Dialtone Order, 7 FCC Rcd at 5797, ¶ 30.

One of the proposals introduced by the LEC's is to allow "channel sharing" on analog video dialtone systems to alleviate an expected shortage of analog capacity.[4] The initial premise on which all the analog "capacity" proposals are based is a realization that analog and digital transmission capacity are separate services from the perspective of programmers *and customers*. The fact that such proposals are put forward indicates that analog video dialtone service, as currently configured, cannot satisfy the Commission's requirement that video dialtone service have sufficient capacity to serve multiple programmers on a nondiscriminatory basis. LECs, therefore, have proposed "channel sharing" schemes to maximize the use of analog capacity, but do so only by discriminating against other programmers. Accordingly, the schemes violate the fundamental common carrier requirements for video dialtone.

Channel sharing arrangements would also violate the Cable Act, because they would either involve the LEC in the transmission of programming directly to subscribers or involve programmers in control of the operation and management of the system. Under the Cable Act, that simultaneous control over transmission of programming and operation of the facilities results in the entity becoming a "cable operator" providing "cable service" over a "cable system," subject to the franchising, cross-ownership, and other requirements of the Cable Act. Since the LECs and their video dialtone programmer customers are without local cable franchises, they would be in violation of the Cable Act. Moreover, once a cable

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[4] Third FNPRM, ¶ 271.

operator, the entities would be subject to must carry and retransmission consent requirements which are wholly inconsistent with the channel sharing proposals.

Public policy further counsels against the adoption of channel sharing schemes. As the Commission has recognized, LECs have an incentive to use their control over capacity to favor and protect certain programmers in which they have an interest.[5] Channel sharing schemes would allow LECs, or other programmers that may "manage" the shared channels, to engage in anticompetitive, discriminatory conduct to the detriment of the public interest.

In the Third Further Notice of Proposed Rulemaking, the Commission also sought comment on proposals to mandate or allow preferential treatment of certain programmers. Like the shared channel proposals, however, these "must carry" and "will carry" proposals would violate the common carrier provisions of the Communications Act, the franchise and cross-ownership provisions of the Cable Act, and the First Amendment. Beyond their illegality, "must carry" and "will carry" proposals also raise serious issues regarding the Commission's prescribing the relative value to the public of — indeed, promoting a substantial preference for — certain programmers as opposed to others. Finally, "must carry" and "will carry" proposals would distort the video programming market, decreasing the chances for the development of new and diverse programming. Accordingly,

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[5] Video Dialtone Order Recon, ¶ 36.

preferential treatment proposals, like channel sharing proposals, would be entirely inconsistent with the Commission's existing video dialtone structure. [6]

I. CAPACITY ISSUES

In the Third Further Notice of Proposed Rulemaking, the Commission requested comments on issues regarding capacity and expandability of video dialtone systems.[7] While the Commission reaffirmed its commitment to the fundamental requirement that video dialtone systems be operated on a common carrier basis,[8] the Commission also recognized that issues and concerns had arisen during the Section 214 application process regarding the capacity of various systems to serve a multiplicity of unaffiliated programmers on a common carrier basis.[9] Particularly, the Commission recognized the difficulty surrounding the technical and operational differences between analog and digital technologies.[10] Accordingly, the Commission sought comment on how to resolve these

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[6] The Commission also sought comment on controlling any anticompetitive practices of the LECs by requiring compliance with reasonable pole attachment and conduit rates for competing facilities-based video programmers such as cable operators. Third FNPRM, ¶ 285. Joint commenters herein agree with and adopt the position advanced in the Pole Attachment Comments of Continental Cablevision, Inc. et al.

[7] Video Dialtone Order Recon, ¶ 268-75.

[8] Video Dialtone Order, 7 FCC Rcd. at 5797-98; Video Dialtone Order Recon, ¶ 30, 32, 33, 35-36, 268.

[9] Video Dialtone Order Recon, ¶ 268-75.

[10] Id. at ¶ 268.

"capacity" issues, focusing on proposed channel sharing schemes and the role of analog and digital technologies.[11]

A. Analog And Digital Video Dialtone Transport Have Been, And Must Be Treated As Separate And Distinct Services

During the Section 214 process, LECs have generally treated analog and digital transmission as separate services.[12] They have stated the number of channels available on their systems in terms of number of analog and number of digital.[13] They have stated economic projections in terms of analog and digital.[14] BellSouth has even gone so far as to propose that the analog capacity of its broadband system be treated solely as channel service and only the digital capacity as video dialtone service.[15]

The LECs' separate treatment of analog and digital capacity recognizes the fundamental, technical, and practical differences between the two services. For instance, most

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[11] Id. at ¶¶ 270-75.

[12] See, e.g., In the matter of the Application of Contel of Virginia, W-P-C-6955 at 6 (filed May 23, 1994) ("GTE Application"); In the matter of the Application of the Ameritech Operating Cos, W-P-C-6926-30 at Exh. A (filed Jan. 31, 1994) ("Ameritech Applications"); In the matter of the Application of US West Communications, W-P-C-6921-22 at Illustrative Tariff p. 7 (filed Jan. 19, 1994) ("US West Applications").

[13] See, e.g., GTE Application at 6; Ameritech Applications at 5; U S West Applications at 6.

[14] See, e.g., In the matter of the Applications of Ameritech Operating Cos., W-P-C-6926-30, *Ex Parte* response to Com. Car. Bur. staff inquiries, at Attachment 2 (filed May 9, 1994).

[15] In the matter of the Application of BellSouth Telecommunications, W-P-C-6977 at 1 (filed June 27, 1994).

cable services are entirely analog, as are consumer televisions and VCRs. Because it requires more MHz of bandwidth per channel than digital signals to transport, however, analog systems have limited capacity and cannot provide advanced, fully interactive services. Accordingly, LECs applying for authorization to provide video dialtone have treated analog and digital transmissions as separate services.

B. Analog Technology Is Incapable Of Providing Nondiscriminatory Common Carrier Capacity To Multiple Video Programmers

Due to the technical parameters inherent in delivering video signals using analog technology, the maximum number of analog channels that can be transported on a hybrid, fiber-coaxial cable system today is approximately 80.[16] Eighty analog channels, however, are insufficient to provide capacity to a multiplicity of unaffiliated programmers on a nondiscriminatory, common carrier basis. In a market where programmers may want 10 or more channels and packagers 30 or 40 channels, an 80 channel analog system would become a "bottleneck."[17] The Commission expressly recognized this problem in its order granting New Jersey Bell authority to provide video dialtone in Dover Township, New Jersey. There the Commission found that a 64 channel system was of sufficient capacity for only a 6 month interim basis, and therefore the Commission required that after 6 months the system provide at least 384 channels.[18] LECs have also recognized that analog video dialtone cannot serve multiple video programmers on a common carrier basis, proposing in their applications

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[16] See, e.g., Ameritech Applications at 5.

[17] Video Dialtone Order, 7 FCC Rcd at 2797-98, ¶ 30.

[18] New Jersey Bell Tel. Co., 9 FCC Rcd 3677, 3680 (1994) ("Dover Order").

assorted schemes for allocating limited analog capacity.[19] All parties appear to agree, therefore, that analog transport technology is incapable of serving multiple programmers on a nondiscriminatory, common carrier basis.[20]

C. No Scheme Involving Channel Sharing Or Telephone Company Manipulation Of Program Signals Is Permissible, Either Legally Or As A Matter Of Public Policy, Within The Structure Of The Commission's Video Dialtone Rules

The Commission has repeatedly stated that the most fundamental element required for video dialtone to advance the Commission's public interest goals is that the service be offered on a strictly common carrier basis.[21] This requirement recognizes that only by adhering to all the elements of common carriage — nondiscriminatory treatment of all comers and no control of the communications by the carrier[22] — can video dialtone protect against anticompetitive abuses by monopoly LECs, allow for the development of greater diversity in local media voices, and spur added competition within the video services markets.[23] Further, the common carrier separation of control over the selection and

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[19] See, e.g., Ameritech Applications at 6; In the matter of the Application of U S West, W-P-C-6921-22, Amendments at 7 (filed Oct. 25, 1994).

[20] Indeed, the Commission has stated that while it is generally "technology-neutral" regarding video dialtone, it is "not technology-neutral with respect to technologies that cannot meet [basic video dialtone] requirements." Video Dialtone Order Recon, ¶ 34.

[21] Video Dialtone Order, 7 FCC Rcd at 5797, ¶ 29; Video Dialtone Order Recon, ¶¶ 30-39.

[22] National Ass'n of Regional Utility Commissioners v. FCC (NARUC I), 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976); National Ass'n of Regional Utility Commissioners v. FCC (NARUC II), 533 F.2d 601 (D.C. Cir. 1976).

[23] See Video Dialtone Order, 7 FCC Rcd at 5782, ¶ 1.

transmission of programming to subscribers from management and control of the transport facilities is critical to keeping a LEC's broadband facilities within the parameters of "video dialtone," and outside the franchising, cross-ownership, and other mandates of the 1992 Cable Act.[24] Any schemes involving sharing of channels or LEC manipulation or control over program signals would violate the fundamentals of common carriage, the 1992 Cable Act, and the Video Dialtone Order.

1. "Common Channel Manager" Type Schemes Create A Cable System, Not A Video Dialtone System

In the Third FNPRM, the Commission noted and requested comment on proposals by LECs designed to maximize use of limited analog capacity.[25] These proposals, as the Commission noted, generally entail a group of channels that are to be filled by chosen programming and then made available for "common" or "shared" use by all programmers/packagers on the system.[26] In most proprosals, a manager or administrator would possibly choose, and at a minimum control, the common channels.[27] No such proposal is legally permissible, however, as allowing a programmer (or programmers), delivering

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[24] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58,Further Notice of Proposed Rulemaking First Report And Order And Second Further Notice of Inquiry, 7 F.C.C. Rcd. 300, 327 (1991), recon., 7 FCC Rcd 5069 (1992), aff'd, National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994) ("First Report and Order"); 47 U.S.C. § 541.

[25] Video Dialtone Order Recon, ¶ 271.

[26] Id. at ¶ 272.

[27] Id. at ¶ 273. U S West has proposed for all programmers to jointly choose the channels to be carried and administer their use. Id.

services over the system, to control or manage capacity of the system would result in a programmer assuming the status of a cable operator, providing cable service over a cable system, thus requiring adherence to the Cable Act's franchising, cross-ownership, and other requirements.

Section 602 of the Cable Act defines a cable operator as anyone who "provides *cable service* over a *cable system* and directly or through one or more affiliates owns a significant interest in such *cable system*. . . ."[28] Cable service is defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service."[29] A cable system is defined as "a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment as designed to provide cable service which includes video programming and which is provided to multiple subscribers in that community."[30] The definition of a cable system specifically includes the facilities of a common carrier subject to Title II to the extent "such facility is used in the transmission of video programming directly to subscribers."[31] Section 621(b) of the Cable Act requires that a "cable operator" obtain a

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[28] 47 U.S.C. § 522(5).

[29] 47 U.S.C. § 522(6).

[30] 47 U.S.C. § 522(7).

[31] 47 U.S.C. § 522(7).

local cable television franchise before beginning operations.[32] In the First Report and Order, the Commission determined that to avoid the

Cable Act's definition of a cable operator, and thus to create a video dialtone system, the programmer-customers could not "*control or be responsible for the management and operation of*" the telephone company's broadband facilities.[33]

No channel sharing scheme can be implemented consistently with the First Report and Order or the Video Dialtone Order, as they would create cable systems and cable operators, requiring franchises and adherence to the Cable Act. Every channel sharing scheme that has been proposed, and indeed any that could be proposed, would inevitably entail some entity, be it the LEC, a manager/administrator, or all the programmers acting jointly, being involved in both provision of programming and the management and operation of the system's capacity. For instance, under the Ameritech and Pacific Bell schemes, the manager/administrator would choose the programming to be carried on the common channels, obtain the rights to the common channels, and control access to the channels by other programmers.[34] Under such a structure, the "common channel manager" would be controlling, through its management of the common channels and their provision to other programmers, the management and operation of part of the broadband system. Further, the common

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[32] 47 U.S.C. § 541(b).

[33] First Report and Order, 7 FCC Rcd at 327, ¶ 52 (emphasis added).

[34] Video Dialtone Order Recon, ¶ 273.

channel manager would be involved in the provision of programming to consumers.[35] Accordingly, the common channel manager would be a "cable operator" providing "cable service" over a "cable system."[36]

The U S West proposal, or variations thereof, gives a similar result. Under U S West's proposal, U S West would deem all analog channels "shared channels," which would be automatically provided to all video dialtone end-user subscribers in an unscrambled format.[37] Although all programmers on the system would vote to determine what programming would occupy the channels, by forcing the creation of a tiering of channels (there is no indication that programmers could vote not to have a shared channel tier) that will automatically be provided to subscribers, U S West would be controlling the packaging and tiering of programming provided to subscribers over facilities which it controls.[38] Accordingly, U S West will be acting as a cable operator, providing cable service over a cable system. Variations on U S West's present proposal would similarly fail. For instance, if U S West were not to force the creation of the shared tier, but leave the decision to all

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[35] Ameritech has made it clear that the common channel manager would also be a programmer-customer of the system. Ameritech *Ex Parte* response to Common Carrier Bureau inquiries at 9.

[36] Indeed, the Ameritech/Pacific Bell type common channel manager scheme would highly resemble traditional channel service, only with the added contractual requirement that the cable operator make its programming available to others who have capacity in the LEC's system. No one would argue that if a LEC imposed a contractual requirement that a cable operator taking channel service allow use of its programming by others, it would magically transport the cable operator out of the Cable Act's reach.

[37] U S West Amendment at 7.

[38] Video Dialtone Order, 7 FCC Rcd at 5817-18, ¶ 69.

programmers, then all the programmers would be cable operators, providing cable service over a cable system. They would control the management and operation of the system through their (1) choice to create a shared channel group or tier, (2) choice of the number of channels to constitute the tier, and (3) choice of the terms and conditions governing the shared channels. And clearly they would be transmitting programming directly to subscribers over that system.

Any scheme for the sharing of channels on a LEC's broadband network would suffer the same fatal flaws as those discussed above, and for the same reason: the separation of control over the facilities and control over programming would be destroyed, resulting in the programmers becoming cable operators providing cable service over a cable system subject to the 1992 Cable Act, and the Commissions cable television regulations.

2. Public Policy Also Dictates Against Channel Sharing

As previously discussed, the Commission's public interest goals in creating video dialtone are to: (1) create opportunities to develop an advanced telecommunications infrastructure, (2) increase competition in the video marketplace, and (3) enhance the diversity of video services to the American public.[39] Channel sharing schemes threaten to thwart the

[39] Video Dialtone Order, 7 FCC Rcd at 5782, ¶ 1.

achievement of these goals, however, because of the inherent risk of discrimination in the selection of programming to occupy the favored capacity.

In the Video Dialtone Order Recon, the Commission recognized that telcos have an incentive to favor and protect, through their control over capacity, certain video programmers, presumably those in which they own an interest or with which they have contractual relations, and that this incentive could lead to behavior that would thwart the achievement of the Commission's public interest goals.[40] While the Commission's Recon discussion was in the context of expansion of video dialtone capacity, the same public policy rationale and concern apply in the context of choosing programming. If a LEC were allowed to directly choose the programming to occupy the shared channels, it would have incentives to choose programming in which it has an interest. For instance, U S West would have a strong interest in giving favored status to Time Warner produced programming, HBO for example, because of its ownership interest in Time Warner.[41] Even if the LEC were not allowed to directly choose the programming to be included on the shared channels, it could still exert influence on its common channel manager or administrator to include programmers in which the LEC had an interest. For instance, Ameritech has admitted that one of the criteria it would use in choosing a common channel manager is the content that the manager proposes to carry.[42]

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[40] Video Dialtone Order Recon, ¶ 36.

[41] See U S West Applications at 3, n. 8.

[42] Ameritech *Ex Parte* response at 9.

A similar risk of discrimination exists even if the LEC is completely incapable of exerting influence over the channels to be carried. Regardless of who chooses the programming to be carried on the shared channels, there is a significant risk of discrimination. The programmer or programmers who choose the common programming will undoubtedly have an interest in favoring programmers or programming in which it holds an interest (in the case of group voting, affiliated programmers could vote as blocks to force in programming in which they have an interest). Allowing the implementation of schemes that present such a threat of discrimination in favor of one programmer over another are wholly inconsistent with video dialtone principles.

3. Channel Sharing Schemes Violate Common Carrier Principles

Channel sharing proposals, also violate one of the fundamental precepts of common carriage — nondiscrimination.[43] In a similar situation, the Commission has applied this common carrier requirement in rejecting proposals to allow LECs to allot all or substantially all of the analog capacity on their systems to "anchor programmers."[44] The Commission stated that "these requests appear to be premised on the assumption that only analog capacity allows a viable alternative to cable service in the short-term. To grant these requests would thus be inconsistent with the common carrier model for video dialtone. . . ."[45]

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[43] NARUC I, 525 F.2d at 640-41.

[44] Video Dialtone Order Recon, ¶ 35.

[45] Id.

The analysis of channel sharing schemes results in the identical conclusion. As the Commission itself recognized, like anchor programmer proposals, "[t]he stated purpose of these analog *channel sharing* mechanisms is to . . . mak[e] video dialtone more attractive and available to multiple video programmers, and more marketable to consumers."[46] In other words, channel sharing proposals are premised on the assumption that only analog capacity will make video dialtone a marketable alternative to cable service in the short term. Like the "anchor programmer" proposals rejected by the Commission, therefore, channel sharing "would thus be inconsistent with the common carrier model for video dialtone. . . ."[47]

The most fundamental requirement of common carriage is that the carrier must accept all who wish to use its service on a nondiscriminatory, first-come-first-serve basis.[48] The carrier cannot give preference to one customer, in the case of telephone, or one speaker in the case of video dialtone service, particularly not due to content of the customer's message. Yet, such a distinction is exactly what would be made in any video dialtone "channel sharing" proposal. Working on the LECs' premise that analog channel capacity is a more marketable service in the short-run, and that analog capacity is limited, the decision by the LEC to force or allow preferential treatment in channel access (and presumably positioning) to certain programmers based on the content of their programming or speech

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[46] Id. at ¶ 271.

[47] Id. at ¶ 35.

[48] NARUC I, 525 F.2d at 640-41.

would constitute a classic example of unreasonable discrimination.[49] Accordingly, channel sharing arrangements would violate common carrier principles, and thus would be inconsistent with the Commission's existing video dialtone scheme.

4. Telephone Company Manipulation Or Control Of Program Signal Transmission Would Violate Common Carrier Principles, The Cable Act, And Public Policy

In the Video Dialtone Order Recon, the Commission requested comments on a proposal by GTE whereby programmers would deliver programming to the LEC in either analog or digital format, and the LEC would then decide whether to transmit the signal using either analog or digital capacity and would perform the necessary manipulations to achieve its choice.[50] GTE's proposal, or some variation on it, would violate common carrier principles, the Cable Act, and public policy.

The other fundamental principle of common carriage beside nondiscrimination is that the customer control its transmission.[51] Yet, under the GTE proposal, the LEC would be controlling the programmers' transmissions. How this violates common carrier principles is best illustrated by an analogy to railroad common carriers. No one would dispute that if an

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[49] See 47 U.S.C. §§ 201-202. No claim could seriously made that it would be reasonable to discriminate in favor of one programmer (e.g. NBC) over another (e.g. C-Span) based on subjective determinations of the programmers' worthiness or marketability. Particularly when the only rationale for having to propose such discrimination is the unwillingness of the LECs to expand the analog capacity of their systems.

[50] Video Dialtone Order Recon, ¶ 269-70.

[51] NARUC II, 533 F.2d 601.

ice cream manufacturer presented its product to a railroad company for transport, the railroad company would not be free to transport the ice cream in unrefrigerated cars. Similarly, if a railroad company had some cars that were configured to carry large, shipping pallets (like those requiring fork-lifts to move) and other cars that were configured to carry many small boxes or packages, and a customer paid for transport of large, shipping pallets consisting of many smaller boxes wrapped together, the railroad company could not dismantle the customers large bundles simply because the train's "small package" cars were empty. If it has a service that can do so, the carrier must deliver the customer's product or message in the form decided by the customer.[52] GTE's proposal, or a variation of it, would violate this common carrier principle.

GTE's proposal, or a variation on it, would similarly violate the Cable Act. In the First Report and Order and the First Report and Order Recon, the Commission determined that telephone companies could provide video dialtone consistent with the franchise and cross-ownership provisions of the Cable Act only because the telephone company would not be transmitting the video signals.[53] The Commission determined that as long as they did not control transmission of programming on their systems, LEC's would not be cable operators because "cable service" entails the transmission of programming to subscribers.[54] GTE's

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[52] This is particularly important in the video transport market, where issues such as channel placement and technical requirements for certain types of transmission are critical.

[53] First Report and Order, 7 FCC Rcd at 327; First Report and Order Recon, 7 FCC Rcd at 5073.

[54] First Report and Order, 7 FCC Rcd at 327; First Report and Order Recon, 7 FCC Rcd at 5073.

proposal is contrary to the Commission's determination, as by having the LEC manipulate the programming signals before transmission, it would involve the LEC in control over the transmission of programming over its system.[55] Accordingly, under GTE's proposal, the LEC would no longer be a video dialtone provider but rather a cable operator, providing cable service over its cable system in violation of the franchise, cross-ownership, and other provisions of the Cable Act.

Finally, the GTE proposal, or a variation thereof, presents a substantial threat of discrimination. As discussed previously,[56] the Commission has recognized the incentive for LECs to act in favor of certain programmers in which they have some interest. GTE's proposal would present an opportunity for LECs to act on that incentive by granting to certain programmers preferential treatment in determining the format in which to deliver their programming. Given that analog format is considered to be the more marketable service, the LEC could simply assure that programmers in which it had an interest were allocated analog capacity, and preferred channel positions.[57] As with LECs refusing to increase capacity in

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[55] The GTE proposal would also involve LECs in control over programming to the extent they would be determining how the programming is presented to subscribers (*e.g.*, through determining what channel position the programming would occupy — a classic cable operator's editorial function). See Video Dialtone Order, 7 FCC Rcd at 5817-18.

[56] Supra p. 14.

[57] Channel positioning is apparently quite important to programmers. Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. at 55 (1992). The programmer that obtains channel number 4 feels it has a much greater likelihood of catching the viewers attention as they "surf" through the channels than the programmer located on channel number 50, or 100, or 150. Similarly, channel location comes into play on the menuing and navigation services LECs propose to use on video dialtone systems, as most on-screen menus can only display approximately 12 channels at a

order to insulate certain programmers from competition, allowing LECs to determine where and how programmers' services are shown would clearly not advance the Commission's public interest goals.[58] Accordingly, GTE's proposal, and variations thereof, cannot legally, and should not as a policy matter, be allowed under the Commission's video dialtone structure.

D. Video Dialtone Applicants Have Insisted That Digital Technology Is Technologically And Economically Available And Viable Now

In their applications, LECs applying for video dialtone authority have argued strenuously that digital transport equipment will be economically and technically viable, and commercially available by the fall of 1994. For instance, U S West stated on March 17, 1994, in its Opposition to petitions to deny, that it "already ha[d] commitments from vendors of digital equipment for its Omaha trial."[59] Further, U S West introduced the Declaration of Alexandre A. Balkanski, Executive Vice President of C-Cube Microsystems, which states that "we are currently delivering a variety of digital compression components for use in numerous systems . . . we are in a first-hand position to know that U.S. West does have digital compression available for its VDT systems *currently*. . . ."[60] Similarly, New Jersey Bell ("Bell Atlantic") assured the Commission that its Dover Township, New Jersey video dialtone system, which would be entirely digital, would have 384 channels of digital capacity available

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time.

[58] Video Dialtone Order Recon, ¶ 36.

[59] In the matter of the applications of U S West Communications, Inc., W-P-C-6919, 6921, 6922, Opposition at 13 (filed March 17, 1994)

[60] Id. at 13-14, attachment 4, Declaration of Alexandre Balkanski ¶ 3 (emphasis added).

by the beginning of 1995.[61] Since being granted authority for its all digital Dover system, Bell Atlantic has filed nothing indicating that 384 digital channels will not be available in January 1995. Other LECs applying for video dialtone authority have also ensured the availability of several hundred compressed digital channels "on the very first day of the service offering."[62] According to the LECs who have decided to provide video dialtone service, therefore, providing several hundred channels of video programming using digital technology is an economically, technically, and practically available option beginning immediately.

II. PREFERENTIAL TREATMENT ISSUES

In the Third Further Notice of Proposed Rulemaking, the Commission also requested comments regarding proposals that the Commission mandate preferential treatment for certain programmers, or that the Commission allow LECs to voluntarily provide preferential treatment to certain programmers.[63] Particularly, the Commission was concerned with the legality of such proposals, and if legal, the policy arguments for and against the proposals.[64] Ultimately, the Commission also requested comments addressing the practical

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[61] Dover Order, 9 FCC Rcd at 3680, ¶ 14.

[62] Ameritech Applications at 5; see also e.g. GTE Application at 6.

[63] Video Dialtone Order Recon, ¶¶ 280-284.

[64] Id.

implementation of such proposals, if they were determined legal and in the public interest to adopt.[65]

A. Preferential Treatment Of Any Programmer, Whether Voluntary Or Commission Mandated, Would Not Be Legally Permissible

In requesting comments, the Commission recognized two manners in which preferential treatment of chosen programmers might be implemented: (1) under mandate by the Commission, or (2) voluntarily by LEC video dialtone providers (so called "will carry").[66] Both of these schemes, however, are legally impermissible under the Communications Act, the Cable Act, or the First Amendment to the Constitution.

1. "Will Carry" Would Violate The Cable Act And The Communications Act

In its most recent Applications for commercial video dialtone authority, Bell Atlantic has proposed to voluntarily set-aside all analog capacity on its systems (approximately 30 channels) for use by local broadcasters and Public, Educational, and Government ("PEG") programmers, free of charge.[67] Such a voluntary "will carry" scheme, however, would violate the Cable Act. As discussed previously, the Commission's video dialtone structure is premised on an interpretation of the Cable Act's definitions of a "cable

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[65] Id.

[66] Id.

[67] In the matter of the application of Bell Atlantic Tel. Co., W-P-C-6966 (filed June 16, 1994) (" Bell Atlantic 6966 Application"); In the matter of the Application of C&P of Virginia & Maryland, W-P-C-6912 (filed June 16, 1994) ("Bell Atlantic 6912 Amendment").

operator," "cable service," and a "cable system."[68] The Commission has determined, and the D.C. Circuit has affirmed, that when a telephone company only controls transport facilities used to carry video signals, and does not control or transmit programming sent over its facilities, as traditionally done by a cable operator, the telco and unaffiliated programmers are not within the Cable Act's mandates.[69] Under will carry proposals, however, the LEC would be choosing what programmers and programming to carry (through its choice of "local broadcasters" and PEG programmers), creating a broadcast basic tier of these packages, and transmitting that programming over its own system. Indeed, under Bell Atlantic's scheme, the LEC would control the reception of the package by subscribers, by automatically providing the tier to all video dialtone end-user subscribers.[70] Accordingly, the LEC would be a "cable operator," providing "cable service" over its "cable system," in violation of the franchising, cross-ownership, and other requirements of the Cable Act.[71]

Will carry type proposals would also violate Section 202 of the Communications Act. A critical element of an Application for video dialtone is that the

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[68] Supra pp. 9-13.

[69] First Report & Order, 7 FCC Rcd at 324; National Cable Television Ass'n, Inc. v. FCC, 33 F.3d 66, 70-74 (D.C. Cir. 1994).

[70] Bell Atlantic 6966 Application at 5.

[71] The "other," overlooked issues that arise from such will carry schemes include: who will pay the copyright fees for transmission of broadcast signals by LECs; what are the network non-duplication and syndex rule implications.